



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
FRANCES A. LORDA)

For Appellant: Ruben Kitay
Certified Public Accountant

For Respondent: Elleene A. Kirkland
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Frances A. Lorda against a proposed assessment of additional personal income tax and penalty in the total amount of \$5,838.38 for the year 1979.

Appeal of Frances A. Lorda

The sole issue is whether appellant has established any error in respondent's adjustment of the taxable gain realized from the sale of her personal residence in 1979.

Appellant's personal income tax return for 1979 indicated a taxable gain of \$70,004 on the sale of her personal residence ("old residence"). She included fifty percent of the taxable gain resulting from that sale in computing her taxable income for that year alleging that she had held the property for more than five years. On **May 7, 1981**, and again on July 2, 1981, respondent requested information which would establish the holding period, sales price and expenses of the old residence, and the cost of the new residence which would justify **partial** non-recognition treatment pursuant to Revenue and Taxation Code section 18091. When appellant failed to reply, respondent issued a notice of proposed assessment on September 28, 1981, indicating an adjustment which added \$35,002 in taxable income to appellant's previously reported income and a 25 percent penalty for **failure** to furnish information. (Rev. & Tax. Code, **§ 18683.**)

On October 27, 1981, appellant submitted a protest in which she did substantiate the sales price of her old residence, the purchase price of her new residence, and some of the expenses of sale, but she did not supply a copy of the escrow statement documenting her purchase of the old residence or any other information which would establish the length of her holding period, **When** appellant failed to reply to a further request for information regarding the length of the holding period and the unsubstantiated sales expenses, respondent **affirmed** its proposed assessment. Appellant thereafter filed this appeal. ^{1/}

^{1/} We note that respondent contends that appellant does **not** qualify for preferential capital gain treatment and must presumably include 100 percent (**\$70,004**) rather than 50 percent (\$35,002) of the taxable gain on the sale of her personal residence in her 1979 income. We note further that the proposed assessment issued in this matter reflects an adjustment of **\$35,002** to appellant's taxable income. As this adjustment and, therefore, the proposed assessment can logically only reflect the holding period issue, we must conclude that the propriety of deducting the selling expenses is not before us at this time.

Appeal of Frances A. Lorda

Revenue and Taxation Code section 18162.5, as in effect in the year at issue, provided as follows:

(a) In the case of any taxpayer, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing taxable income:

(1) One hundred percent if the capital asset has been held for not more than one year;

(2) Sixty-five percent if the capital asset has been held for more than one year but not more than five years;

(3) Fifty percent if the capital asset has been held more than five years.

(b) This section shall apply with respect to taxable years beginning after December 31, 1971.

As indicated above, based upon lack of substantiation, respondent determined that one hundred percent, rather than fifty percent, of the taxable gain should be included in appellant's 1979 taxable income. It is now well settled that respondent's determinations of tax and penalties (other than fraud) are presumed correct, and that the taxpayer has the burden of proving them erroneous. (Appeal of Ronald W. Matheson, Cal. St. Bd. of Equal., Feb. 5, 1980; see also Todd v. McColgan, 89 Cal. App.2d 509 [201 P.2d 414] (1949); Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.)

Appellant's only contention appears to be that she cannot establish the holding period of her old residence since her former husband has the copy of the escrow statement reflecting the purchase date. However, it would appear to us that information establishing the purchase date of her old residence would be readily established from other sources which would satisfy her burden of proof.

Based upon the record before us, we have no choice but to hold that appellant has failed to carry her burden of proving respondent's determination of tax and penalty is erroneous, and, accordingly, respondent's action must be sustained.

Appeal of Frances A. Lorda

O R D E R

Pursuant to the views 'expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND **DECREED**, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Frances A. **Lorda** against a proposed assessment of additional personal income tax and penalty in the total amount of **\$5,838.38** for the year 1979, be and the same is hereby sustained.

Done at Sacramento, California, this 15th day of September, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, **Mr. Dronenburg**, Mr. Nevins and Mr. Harvey present.

<u>William M. Bennett</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9